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Virginia Law Register

VOL. XIX.]

AUGUST, 1913.

[No. 4

COLLATERAL INHERITANCE TAX.

The trend of public sentiment has been for years, and is likely to be in the future, in the direction of seeking every available subject of taxation possible. The action of Congress and the Legislatures of nearly all the States, in recent years, has given expression to this sentiment in the form of income tax, excise tax, collateral inheritance tax, death dues, etc., and the wit of man is likely to be taxed in finding still further subjects, and ways and means, for increasing public revenue.

This legislation has been generally sustained by the courts as valid, and the question of the constitutional power of the General Assembly of the State of Virginia to impose a collateral inheritance tax was tested as long ago as 1858, in the case of *Eyre v. Jacob, Sheriff*, 55 Virginia Report 422. The Court stood three to two, and no dissenting opinion was filed.

The recent utterance of Vice-President Marshall in New York is substantially in accord with what our court held in this case. Page 430, "the right to take estate by descent or devise is denominated as a civil right or privilege, and the tax imposed is a tax on its transmission, as distinguished from a general property tax," which the legislature has a right to impose in the absence of any prohibition in the Constitution.

This opinion states, page 430, "the right to take property by devise or descent is the creature of the law and secured and protected by its authority. The Legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent to a particular class of his kindred, say to his lineal descendants; it might impose terms and conditions upon which collateral relations may be permitted to take it; or it may tomorrow, if it pleases, absolutely repeal the statute of wills and that of descent and distribution, and declare that upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses. Possessing this

sweeping power over the whole subject, it is difficult to see upon what ground its right to appropriate a modicum of the estate, call it a tax or what you will, as the condition upon which those who take the estate shall be permitted to enjoy it, can be successfully questioned; that the tax is confined to collateral inheritances and devises to others than those specified presents no difficulty." The Court, in this case, went almost as far as Marshall said legislatures could go, to wit: "the power to tax is the power to destroy," if the act of the state of Maryland taxing Bank of United States was upheld as valid, which it was not. *McCulloch v. Maryland*, 4 Wheat. 316.

This law existed for some years previous to 1858, and has continued from that day to this almost continuously. The right to impose this tax has been recognized in numerous decisions since made, so it may be taken as the settled law of this State, that the constitutional right to impose collateral inheritance tax exists, and that it may be imposed on direct inheritances and bequests, and upon indirect or collateral inheritances and bequests, of every character and kind and practically without limit. In other words, the extreme doctrine is established, that after the payment of debts of the decedent, the entire residue might be appropriated to public uses.

The Constitution of 1902, § 183, imposes no limitation upon the power of the Legislature to impose this tax, and therefore it is unlimited and unrestricted. It simply provides that no inheritance tax shall be charged, directly or indirectly, against any legacy or devise for the benefit of any institution or other body, or any natural or corporate person, whose property is exempt from taxation, etc. This leaves the door wide open to all that socialism, in its most rampant form, may demand and enact.

By Act of 1843-44, Code of 1860, Page 189, § 9, it is provided "that where any real estate of a decedent shall under his will or by descent pass, etc. * * * The clerk of the court in which the will is recorded and the clerk of the court in which any such real estate is situated, upon ascertaining the fact shall report the same to the Commissioner for the district in which such real estate may be."

By the terms of § 38 of this act, Code of 1860, 194, it was

provided where any real estate of a decedent of a greater value than \$250 shall by descent or devise pass, etc., * * * the Commissioner shall, in addition to the annual land tax imposed upon such real estate, assess thereon a specific tax of two per centum on said estate.

Section 5 of this Act, Code of 1860, page 237, provided that where any estate of a decedent within this Commonwealth shall pass under his will or the laws regulating descents, etc. * * * the estate so passing, if of a greater value than \$250, shall be subject to a tax of a certain per centum. This section did not specify the rate of taxation, but imposed it upon all the estate of the decedent so passing, in excess of \$250. By § 8 of the same act, it is provided the per centum shall be governed by the law in force at the time of the decedent's death, etc.

This act contained provisions imposing a liability on the personal representative to pay this tax on the estate which came into his hands and imposed a penalty (§ 11) for his failing to do so, and provided that the receipt showing the payment should be delivered to the Commissioner of Revenue, and also, to the Clerk of the Court of the county and be recorded by him, and he was required to transmit a copy of it to the Auditor. As to real estate, which was not directed to be sold, etc., by the personal representative, the tax of two per centum was imposed on the land, as a land tax, and like other taxes became a lien thereon. It was assessed by the Commissioner and the heir or devisee was required to pay this tax in addition to the annual land tax. Thus effective provisions were made, at an early date, for the imposition and collection of this tax on both the real and personal property of the decedent in excess of \$250 passing to collateral kindred or to unrelated parties. These provisions remained in force and effect. See Code of 1873, page 363, §§ 1, 2 and 7, page 291, § 19, and page 349, § 3, which changed the rate from two per centum to six per centum upon the value or amount of the estate in excess of \$250.

The Auditor seems to have had authority to make appointment of collectors of delinquent taxes, including collateral inheritance taxes, but this authority was taken away and he was directed to revoke and cancel all appointments theretofore made

of such collectors, by act approved, January 28th, 1884, page 56. Another act was passed, approved, March 11th, 1884, page 498, which repealed all acts and parts of acts imposing a tax on collateral inheritances and all penalties incurred, and all taxes, under the provisions of said acts or parts of acts claimed to be due, were remitted.

The law imposing a tax on collateral inheritances had been disregarded and treated largely as a dead letter by everybody. Much of this tax had never been paid and many estates were subject to the lien thereof and to penalties for failure to pay. This repealing act, remitting these taxes in arrear, perfected the title to all such estates and removed the lien of this tax.

By act, approved February 14th, 1896, page 367, a tax was again imposed on collateral inheritances and to regulate the collection of the same. The rate of the tax was fixed at five per centum on every one hundred dollars thereof without exemption. By § 2, the personal representative was required to pay the whole of the tax except on real estate, to sell, etc., which he was not authorized by the will to do. Section 3 prescribed that this tax should be paid by the devisee or devisees or parties to whom the land shall descend.

Section 4 directs that the payment shall be made to the Treasurer or other collector, and § 5 that the Treasurer or collector shall apply for the tax, and that he shall give duplicate receipts therefor, one of which shall be lodged with the Clerk of Court and be recorded by him, and the other shall be given to the Commissioner of the Revenue in the county, to be by him forwarded to the Auditor. A fine of \$100 is imposed for failure of the personal representative or other party or officer to comply with the requirements of § 5, and by terms of § 6, if the tax is not paid by the party whose duty it is to do so damages are imposed at the rate of ten per centum per annum from the time such estate is paid or delivered over until the tax is paid, and it shall be deemed paid or delivered at the end of a year from the decedent's death unless and except so far as it may appear that the legatee or distributee has neither received such estate nor was entitled to then demand it.

It is obvious, when these acts are carefully considered, that this

is a property tax, and is distinguished from a personal tax, and, being such, it became, and it was the intention of the Legislature it should become, a lien on the property and, especially, the land devised or which descended. The earlier acts in express terms, as above stated, required the Commissioner of Revenue to impose the tax. The last act of 1896 omits this provision, but makes it the duty of the personal representative and the heir or devisee to pay it, and it provided that the evidence of such payment should be recorded on the records of the county where the qualification was had, in the book containing appraisements and accounts of sale, and thus the evidence of payment in the county where the estate was located was fully provided for, and any one making search of the title, or making up an abstract thereof, had no difficulty in finding the evidence of such payment if it had been made.

Without doubt, in many instances, this tax has not been paid, and considerable real estate in this Commonwealth is subject to the lien thereof and, probably, the profession, in many instances has overlooked the existence of the tax and lien therefor. Not only does such tax remain unpaid in many instances, but, in addition thereto, there is to be added, under the provisions of this act, damages thereon at the rate of ten per centum per annum from the end of one year from the decedent's death.

This act was amended in 1897-98, 569, but simply to add the proviso that such tax shall not be imposed upon any property used exclusively for State, county, municipal, benevolent, charitable, educational or religious purposes. This act was carried forward and practically re-enacted in the Code of 1904, page 2219, § 44a.

By act approved March 14th, 1910, page 229, the Legislature amended § 44a, and there was never a more bungling piece of legislation enacted by a Legislature or approved by a Governor than this act. This act requires impossibilities, and it is utterly impossible to comply with its requirements. It provides that the Clerk of the Court before whom the will is probated or administration granted shall determine the collateral inheritance tax, if any, to be paid on the estate, etc.; shall enter of record in the order book of the court by whom such tax shall be paid, and the amount to be paid. He is to certify a copy of such or-

der to the Treasurer of his county and to the Auditor of Public Accounts. The Auditor is to charge the Treasurer with the tax, etc. Penalties and damages are imposed for failure to pay. Sub-section e provides for the institution of suit, etc.

At the time of qualification on an estate, in almost every instance, it is utterly impossible to know what estate will pass or the value thereof, which will be the subject of the imposition of this tax. There are the expenses of administration, funeral expenses, the debts of the decedent, which oftentimes for years are the subject of litigation and the amounts thereof are unknown. In this state of affairs, it is a mere conjecture what those entitled as heirs and devisees and distributees will be entitled to, and the amount and value thereof. The entire personal estate may be swept away with debts, and the real estate, in whole or part, may also be subjected to debts, and yet, under the literal requirements of this act, an estimate has to be made at the time of qualification. The Clerk must make an order in respect thereto, certify the same to the Treasurer and the Auditor, and the liability becomes fixed, to be paid at the end of a year from the decedent's death.

It is obvious this piece of legislation was never carefully considered. No provision was made for the assessment of these taxes, except by the Clerk, etc., as above, which can not be done with any degree of accuracy, or in justice to those interested. No provision is made for the placing on record, in the Clerk's office, of the evidence of the payment of this tax, as was provided by the previous act, and any one examining the title to property, subject to this tax will be confronted with serious difficulties because the evidence thereof is not a matter of record, as it should be, on the land records of the county where the land is located.

The act, approved March 13th, 1912, page 453, does not seem to have any bearing on the subject of collateral inheritance tax. In terms, it applies only to decedents, who died intestate, and requires a statement to be made, giving the names, ages and addresses of the heirs, etc. This does not aid materially in solving the troubles which arise under the act of March 14th, 1910, and does not touch the subject of estates where the parties die tes-

tate. There certainly is a loud and imperative call for remedial legislation on this subject, and the question is what will put it on practical lines. If it were made the duty of the Commissioner of Revenue, where parties die within his district, or the Justice appointed by the State Board of Health, under act of March 12th, 1912, to report the fact to the Clerk of the Court and the Commissioner of Accounts, and also, in case of intestacy, who the heirs at law are, some practical method might be adopted, such as making it the duty of the Commissioner of Accounts, Clerk and Assessor, to impose this tax in accordance with law on the estate, after the payment of debts, funeral expenses, etc., as distributions are made, from time to time, and on the land when it is not subject to the payment of debts. In addition to this there should be some practical provision enacted which would place on record, in the county where the land lies, the evidence of the payment of this tax.

The act of 1895-6 did not in terms make this tax a lien on the land, but, as it is a property tax, and all property taxes are a lien on the property subject thereto, it would seem reasonably clear that this tax became and is a lien on land throughout the Commonwealth, and, perhaps, many properties are subject to this tax which has not been paid. However, to remove any possible doubt on this subject, if any existed, which in our opinion did not, it was provided, Subsection c, Act of March 14th, 1910, in express terms, the tax should be a lien on real estate, and gives the Treasurer the right to rent, sell, etc.

This matter is submitted to the profession in the hope that some of the members thereof, who may be members of the Legislature, or other members, may take an interest in the subject and get the same on practical lines, and such as will not be a cloud upon the title of many valuable estates in this Commonwealth.

EDMUND NICHOLS.

July 3, 1913.